Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 96-319
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162
	)	
Implementation of Section 601(d) of the Telecommunications Act of 1996, and Sections 222 and 251(c)(5) of the Communications Act of 1934	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	
Requests of Bell Atlantic-NYNEX Mobile, Inc., and U S WEST, Inc., for Waiver of Section 22.903 of the Commission's Rules	)	

NOTICE OF PROPOSED RULEMAKING, ORDER ON REMAND, AND WAIVER ORDER

Adopted: July 25, 1996 Released: August 13, 1996

Comment Date: **30 days after Federal Register publication**
Reply Comment Date: **51 days after Federal Register publication**
Comments and Replies are to be filed in WT Docket 96-162 only.

By the Commission:

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I. INTRODUCTION

1. In this Notice of Proposed Rulemaking, we initiate a comprehensive review of our existing regulatory framework of structural and nonstructural safeguards for local exchange carrier (LEC) provision of commercial mobile radio services (CMRS).[1] We propose herein to eliminate our current Part 22 requirement that Bell Operating Companies (BOCs) must provide cellular service through a structurally separate corporation,[2] and we seek comment on whether we should adopt a transition to this end. This Notice thus responds to one of the issues remanded to the Commission by the Sixth Circuit's *Cincinnati Bell* decision.[3] We also propose rule changes necessary to implement those provisions of the Telecommunications Act of 1996[4] that govern the joint marketing of CMRS and landline services, protections for customer proprietary network information (CPNI) and network information disclosure.

2 By instituting this proceeding, we seek to implement further the mandate of the 1993 Budget Act to treat similar commercial mobile radio services similarly by placing all CMRS licensees under a uniform set of nonstructural safeguards.[5] We have previously recognized that the 1993 Budget Act revisions to the Communications Act reflect a Congressional objective that, "consistent with the public interest, similar commercial mobile radio services are accorded similar regulatory treatment."[6] Further, in the *CMRS Third Report and Order*, the Commission concluded that all CMRS -- including one-way messaging and data, and two-way voice, messaging and data -- are competing services or have the reasonable

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[1] This Notice will primarily examine service safeguard issues with respect to those enumerated services that have been referred to as broadband CMRS: Domestic Public Cellular Radio Telecommunications Service (cellular) and broadband Personal Communications Services (PCS). *See* 47 C.F.R. § 22.9(a) (4) and (7). We also will seek comment as to whether the revised service safeguards proposed herein for LEC PCS should be extended to LEC provision of Specialized Mobile Radio (SMR).

[2] 47 C.F.R. § 22.903.

[3] *Cincinnati Bell Telephone v. FCC*, 69 F.3d 752 (6th Cir. 1995) (*Cincinnati Bell*).

[4] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("the 1996 Act"), amending the Communications Act of 1934, as amended, 47 U.S.C. § § 151, *et seq.* (" the 1934 Act" or "the Act"). For purposes of this proceeding, we define the terms "affiliate," "BOC," "in-region state," and "interLATA service," as those terms are defined in Sections 3(a)(33), 3(a)(35), 271(i)(1), 3(a)(42), respectively, of the Act. In addition, we define "AT&T Consent Decree" as that term is defined in Sections 3(a)(34) and 601(e)(1) of the Act; and "local exchange carrier" and "incumbent local exchange carrier," as those terms are defined in Sections 3(a)(44) and 251(h) of the Act.

[5] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993)(Budget Act).

[6] *See* Budget Act at § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. at 392; *CMRS Second Report and Order*, 9 FCC Rcd at 1418, *citing* H.R. Rep. 102-213, 103rd Cong., 1st Sess. 494 (1993) (Conference Report); *see also* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 259-60 (House Report).

potential to become competing services in the CMRS marketplace.[7] A central focus of our review is the question of whether the structural separation requirements of Section 22.903 continue to serve the public interest. We will include in our review of our existing rules the examination of the broader competitive issues raised by provision of in-region wireless services by all local exchange carriers, and of the effects of the 1996 Act on our existing and proposed rules.

II. EXECUTIVE SUMMARY

3. This Notice includes several proposals designed to facilitate a smooth transition from structural separation to the more flexible competitive paradigm established by the 1996 Act. These proposals are discussed in detail in Sections IV, V and VI, below. A chart depicting our current requirements and the proposals made herein, is attached as Appendix C for illustrative purposes only. In Section IV, we examine the restrictions imposed in Section 22.903 of the Commission's Rules regarding provision of cellular service by the BOCs. In particular, in response to the decision of the Court of Appeals for the Sixth Circuit in *Cincinnati Bell*, we consider the continued necessity of the requirement that a BOC seeking to offer cellular service do so through a separate subsidiary corporation.

4. We propose two options. The first option would generally retain streamlined separate affiliate and nondiscrimination requirements of Section 22.903 for BOC provision of cellular service within the BOC's area of operation (*i.e.*, "in-region"), but would sunset the restrictions for a particular BOC when that BOC receives authorization to provide interLATA service originating in any in-region state. For example, we propose to retain the prohibition against a BOC cellular affiliate owning any landline facilities that the incumbent affiliated LEC uses in the provision of landline local exchange services, but we would permit the cellular affiliate to own landline facilities for the provision of, among other things, competitive landline local exchange service (CLLE). In addition, we seek to implement that portion of the 1996 Act that permits a LEC to market jointly and resell the cellular service of its separate subsidiary. In so doing, we seek comment on whether permitting integrated provision of resold cellular and landline service would raise anticompetitive concerns. We also pose questions regarding the treatment of customer proprietary information and network information.

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[7] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz frequency Band, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, GEN Docket No. 93-252, PR Docket No. 93-144, PR Docket No. 89-553, 9 FCC Rcd 7988, 7996, 8001-36 (1994) (*CMRS Third Report and Order*). *See also* Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Radio Services, First Report, 10 FCC Rcd 8844 (1995) (*CMRS Annual First Report*).

5. The second option we propose is to eliminate Section 22.903 immediately in favor of the uniform safeguards for LEC provision of PCS, and potentially other CMRS, proposed in Section VI of this Notice. This option differs from Option 1 primarily in that it would eliminate the requirements for independent operation, separate officers and personnel, and arm's-length transactions between the BOC and its cellular affiliate, although such transactions would still be subject to Part 64 cost allocation rules. Regardless of which option we ultimately adopt, this Notice grants the BOCs immediate interim relief through a waiver of our current rules as they apply to out-of-region cellular service, pending the outcome of this rulemaking. Thus, a BOC will no longer need to have in place a separate subsidiary to provide cellular service outside of its service area.

6. In Section V, we explore ways to achieve regulatory parity among wireless providers. In particular, we reexamine the basis for excluding LECs other than BOCs from Section 22.903. While we conclude that the rationale for requiring BOC structural separation could be extended to Tier 1 LECs, we decline to propose that Section 22.903 apply to such LECs in light of our proposal to eliminate the rule, either immediately or after a sunset period. We do propose, however, that the safeguards proposed in Section VI extend to all Tier 1 LECs rather than just the BOCs.

7. In Section VI, we propose a uniform set of streamlined competitive service safeguards for the in-region provision of PCS and other CMRS by Tier 1 LECs. These safeguards are based on a "Plan of Nonstructural Safeguards Against Cross-Subsidy and Discrimination" filed by PacTel in 1995. We propose that all Tier 1 LECs providing broadband PCS within their in-region states file with the Commission a nonstructural safeguard plan that includes the following elements:

(1) a description of a separate affiliate (defined with reference to the 1985 Competitive Carrier *Fifth Report and Order*) for the provision of PCS;

(2) a description of compliance with our Part 64 and Part 32 accounting rules, with copies of the relevant cost allocation manual changes attached;

(3) a description of planned compliance with all outstanding interconnection obligations;

(4) a description of compliance with all outstanding network disclosure rules; and

(5) a description of planned compliance with the customer proprietary information requirements in new Section 222 of the 1996 Act.

In addition, we seek comment regarding whether to adopt a sunset period for these rules, and whether to apply these safeguards to Tier 1 LECs' in-region provision of CMRS other than PCS.

III. REGULATORY BACKGROUND

8. Currently, we have distinct rules for BOC provision of cellular service versus non-BOC provision of personal communications service (PCS) and other commercial mobile radio services. BOCs are required to provide cellular service through structurally separate subsidiary corporations, whereas all other LECs may provide cellular service on an unseparated basis. Moreover, we have declined to impose these restrictions on LEC, including BOC, provision of other CMRS, such as PCS and specialized mobile radio (SMR) service.[8]

9. In numerous recent waiver requests, the BOCs have sought relief from our cellular structural separation rule on the grounds of changed circumstances and competitive necessity.[9] The BOCs' challenges to the continued viability of the restrictions contained in Section 22.903 are premised on two points: (1) the Commission's existing interconnection rules and accounting safeguards are sufficient to protect against anticompetitive behavior by the BOCs; and (2) LECs that are not BOCs are treated differently with respect to the provision of cellular service and other commercial mobile radio services. In response, parties opposing grant of such waivers have cited the broader competitive implications of the individual waiver requests, and have generally disputed the BOC claims. A comprehensive record has thus been generated on these issues in response to these waiver requests, and with respect to PacTel's PCS Nonstructural Safeguards Plan.[10]

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[8] *See* Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, GEN Docket No. 94-90, Report and Order, 10 FCC Rcd 6280 (1995) (*Wireline SMR Order*), *recon. pending*; Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700, 7747-52 (1993), *reconsideration*, 9 FCC Rcd 5154 (1994) (*Broadband PCS Order*); Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GEN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994), *reconsideration pending* (*CMRS Second Report and Order*).

[9] *See* Bell Atlantic NYNEX Mobile's Request for a Waiver of Section 22.903 of the Commission's Rules, *Public Notice*, DA 96-37 (released January 19, 1996); Motion of Southwestern Bell Mobile Systems, Inc., Memorandum Opinion and Order, FCC 95-436, CWD-95-5 (released October 25, 1995) (*SBMS Waiver Order*); Ameritech's Petition for Partial Waiver of Section 22.903 of the Commission's Rules, *Public Notice*, DA 95-2198 (released October 19, 1995); US West, Inc. Request for a Waiver of Rule 22.903, *Public Notice*, DA 95-2478 (released December 14, 1995); BellSouth Corporations's Request for Resale Authorization, *Public Notice*, DA 95-1901 (released August 31, 1995) (BellSouth Resale Request). To the extent the records developed in the several waiver proceedings, and in other related licensing proceedings, discussed below, have a bearing upon the issues examined in this rulemaking, we incorporate such pleadings by reference.

[10] *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services' Plan of Nonstructural Safeguards Against Cross-Subsidy and Discrimination, GEN Docket No. 90-314, Order, DA 96-256 (Wir.Tele. Bur. Feb. 27, 1996) (*PacTel Plan Order*) (approving PacTel Plan, subject to outcome of this rulemaking).

10. A central purpose of the 1996 Act is to provide open access to local and other telecommunications markets in order to encourage entry by new competitors.[11] The legislative history states that the 1996 Act is intended to "provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition."[12] Structural separation was originally imposed over a decade ago on certain local exchange carriers to prevent them from leveraging their market power in the local exchange market into other competitive markets, such as cellular service. With this Notice, we move from this regulatory model to the competitive paradigm established by the new legislation and the current telecommunications marketplace.

11. At the outset, we remain cognizant that CMRS providers will, in the very near term, need to enter into a series of agreements with local exchange incumbents for such things as the mutual exchange of traffic, the location of equipment, and the sharing of network functionalities.[13] Effective competitive safeguards, where a demonstrated need exists, should permit competitors to construct their networks, implement their business plans, and begin offering service to customers with the reasonable assurance that the incumbent local exchange carrier will not be able to extend its market power into the critical new PCS market. The question of what these safeguards should be and whether they should remain in place for a transitional period is the primary subject of this rulemaking. In order to adequately answer this question, we need to review the reasons behind the Commission's adoption of its current safeguards.

A. Derivation of Current Safeguards

1. BOC Cellular Structural Separation

12. The original version of Section 22.903 was adopted as Section 22.901 in 1981, when the Commission amended Part 22 of the rules to provide for the authorization of two cellular licensees in each market -- one wireline carrier and one non-wireline carrier.[14] To preserve the competitive potential of the non-wireline cellular provider, the Commission

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[11] *See, e.g.,* Statement of Senator Pressler, "The more open access takes hold, the less other government intervention is needed to protect competition." Cong. Rec. S7889 (daily ed. June 7, 1995) (statement of Sen. Pressler); Statement of Senator Hollings, "Competition is the best regulator of the marketplace. But until that competition exists, until the markets are opened, monopoly-provided services must not be able to exploit the monopoly power to the consumers' disadvantage. Competitors are ready and willing to enter new markets as soon as they are opened." Cong. Rec. S7984 (daily ed. June 7, 1995) (statement of Sen. Hollings).

[12] *See* S. Conf. Rep. No. 230, 104th Cong., 2nd Sess. 1 (1996) (Joint Explanatory Statement).

[13] *See, e.g.,* Section 101 of the 1996 Act, adding Part II, entitled, "Development of Competitive Markets," to Title II of the 1934 Act.

[14] *See* Cellular Communications Systems, 86 FCC 2d 469 (1981)(*Cellular Order*); Cellular Communications Systems, 89 FCC 2d 58 (1982)(*Cellular Reconsideration Order*); and Cellular Communications Systems, 90 FCC 2d 571 (1982)(*Cellular Further Reconsideration Order*).

required the wireline carrier to provide its cellular service through a structurally separate subsidiary, *i.e.*, an independent corporation with separate officers, separate books of account, and separate operating, marketing, installation and maintenance personnel, and also prohibited cellular licensees affiliated with landline LECs from owning facilities for the provision of landline telephone service. The structural separation requirement was intended to protect against improper cross-subsidization, to assure equitable interconnection arrangements, and to make the detection of anti-competitive conduct "somewhat easier for the regulatory authorities."[15]

13. In 1982, the Commission revised Section 22.901 to apply only to AT&T and its affiliates.[16] In 1983, the Commission further amended Section 22.901 in response to the breakup of AT&T under the divestiture agreement entered into by AT&T and the Department of Justice.[17] The chief question addressed was whether the BOCs possessed the potential to cross-subsidize and discriminate, and if so, whether nonstructural safeguards alone would provide adequate protection. The Commission concluded that BOC control over local exchange services provides an opportunity for anti-competitive conduct with respect to customer premises equipment (CPE), enhanced and cellular services, much the same as it did for AT&T.[18] The Commission further found that the BOCs would have the financial resources to provide cellular service through structurally separate subsidiaries.[19]

2. Current Part 22 Requirements

14. A final revision of the cellular structural separation requirement occurred in the 1994 *Part 22 Rewrite Order* as part of the Commission's comprehensive reorganization of Part 22 of our Rules. In that Order, Section 22.903 was amended to incorporate the provi-

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[15] *Cellular Order*, 86 FCC 2d at 493-95.

[16] *Cellular Reconsideration Order*, 89 FCC 2d at 79 (in "determining whether a particular carrier should be required to operate through a separate subsidiary, the decision must be based, to the extent possible, on how such a requirement will affect the likelihood that the carrier would otherwise engage in the practices that the requirement is designed to guard against and the ability of the carrier to withstand the costs associated with the requirement.")

[17] *BOC Separation Order*, 95 FCC 2d at 1120. Under the divestiture agreement, the 22 BOCs owned by AT&T were divested and consolidated into seven regional holding companies. *U.S. v. American Telephone & Telegraph Company and U.S. v. Western Electric Company* , Modification of Final Judgement, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983) (*MFJ*).

[18] *BOC Separation Order*, 95 FCC 2d at 1131-37.

[19] *Id.* at 1137-40. At the same time, the Commission indicated that it would review the appropriateness of the separation conditions within two years following the BOCs' compliance with the *Computer II* structural separation conditions, as modified in the *BOC Separation Order*. *Id.* at 1140.

sions of former Section 22.901.[20] Section 22.903 essentially consists of two parts: the requirement that BOCs provide cellular service through a separate corporation; and a series of restrictions on the operation of that separate affiliate, including restrictions on use and ownership of landline transmission facilities and requirements for the independent operation of the separate cellular affiliate through separate books of account, officers, operating, marketing, installation and maintenance personnel and utilization of separate computer and transmission facilities in the provision of cellular service. In addition, subsection (d) requires that all transactions between the BOC and the cellular subsidiary or its affiliates be reduced to writing and that a copy of all agreements (other than interconnection agreements) between such entities be kept available for inspection upon reasonable request by the FCC. It also requires that all affiliate contracts with respect to cellular/landline interconnection be filed with the Commission; however, this requirement does not apply to any transaction governed by an effective state or federal tariff. Subsection (e) prohibits BOCs from engaging in the sale or promotion of cellular service on behalf of the separate corporation. This prohibition does not extend to joint advertising or promotions by the landline carrier and its cellular affiliate. Finally, the rule prohibits the provision of BOC customer proprietary network information (CPNI) to the cellular affiliate, unless such CPNI is made publicly available on the same terms and conditions.[21]

3. Nonstructural Safeguards for Other LEC CMRS

15. Broadband PCS Proceeding. The *Broadband PCS Order*[22] found that allowing LECs to participate in PCS may produce significant economies of scope between wireline and PCS networks, and that these economies will promote more rapid development of PCS, yield a broader range of PCS services at lower costs to consumers, and should encourage LECs to develop their wireline architectures to better accommodate all PCS. Thus, the Commission declined to impose structural separation for PCS providers affiliated with LECs, including the BOCs, reasoning that such limitations on the ability of LECs to take advantage of their potential economies of scope would "jeopardize, if not eliminate, the public interest benefits

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[20] Section 22.903 of the Commission's rules was amended effective Jan. 1, 1995. *See* Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Report and Order*, CC Docket No. 92-115, 9 FCC Rcd 6513 (1994) (Appendix A-40) (*Part 22 Rewrite*), *reconsideration pending.*

[21] In our *Part 22 Rewrite* proceeding, no substantive change to Section 22.903 was intended. An inadvertent change was made, however, in the description of the prohibition on joint sale or promotion of cellular and landline service in Section 22.903(e) that deleted the modifying phrase of "except on a compensatory, arms-length basis" contained in old Section 22.901(d). Southwestern Bell filed for reconsideration of this change in the text of the rule. In light of the joint marketing authority granted the BOCs under Section 601(d) of the 1996 Act, as implemented in this proceeding, the relief requested by Southwestern is rendered moot. *See* discussion *infra* at Section IV.

[22] *Broadband PCS Order*, 8 FCC Rcd at 7748 n. 96, 7751-52 (LECs may hold PCS licenses, except where barred by their cellular holdings; commencement of service by LECs would be contingent upon the LEC implementing an acceptable plan for nonstructural safeguards against discrimination and cross-subsidization).

sought through LEC participation in PCS.[23] The Commission further concluded that the cellular-PCS cross-ownership policies "are adequate to ensure that LECs do not behave in an anticompetitive manner."[24] The Commission also found that existing accounting safeguards were sufficient to protect against cross-subsidization by the LECs, and therefore declined to impose additional cost-accounting rules on LECs that provide PCS service.[25] The *Broadband PCS Order* also reiterated that commencement of PCS operations by LECs would be contingent on the LEC implementing an acceptable non-structural safeguards plan.[26] Finally, although the issue had been raised in the *Broadband PCS Notice*, we declined to eliminate the structural separation requirement for BOCs and their cellular operations, citing the insufficiency of the record.[27]

16. Other CMRS. In the *CMRS Second Report and Order*, the Commission concluded that all LECs with CMRS affiliates must follow the same accounting safeguards that were adopted in the PCS proceeding.[28] The Commission observed that these safeguards were necessary to prevent cost-shifting from the non-regulated affiliates to the regulated ratebase of the local exchange carrier.[29] We also noted that the commenters had raised important issues with respect to the potential role of accounting, structural separation, and other safeguards in promoting a competitive CMRS environment. Although we deferred consideration of these issues to a separate proceeding, we emphasized that the Commission "can play a positive role in fostering this competitive environment by examining and establishing the proper mix of safeguards designed to ensure that no CMRS provider gains an unfair competitive advantage resulting from its size or preexisting position in particular CMRS markets."[30] At that time, due to inadequate notice and an insufficient record, the Commission again declined to address the issue of removing the cellular structural separations requirements

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[23] *See* Part 32 and Part 64 of the Commission's Rules, 47 C.F.R. Parts 32, 64.

[24] *Id.* at 7751 n.98, *citing* Computer III Remand Proceedings, 6 FCC Rcd 7571, 7614-26 (1991) *(BOC Safeguards Order), vacated in part, California v. FCC,* 4 F.3d 1505 (9th Cir. 1993) (*California II*) (prior and subsequent history omitted).

[25] *See* 47 C.F.R. § 64.901 and § 64.902.

[26] *Broadband PCS Order* at 7748 n.96.

[27] *Id.* at 7751 n.98.

[28] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GEN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1492-93 (1994) (*CMRS Second Report and Order*), *reconsideration pending.*

[29] *CMRS Second Report and Order*, 9 FCC Rcd at 1492.

[30] *Id.* at 1492-1493.

for the BOCs.[31] In addition, in our recent order permitting wireline carriers to provide specialized mobile radio ("SMR") service, we did not require LECs to establish structurally separate entities.[32] We did state, however, that LECs providing SMR service, or CMRS generally, would have to comply with accounting safeguards and affiliate transaction rules.[33]

B. Recent Developments

17. Cincinnati Bell. On November 9, 1995, the Sixth Circuit Court of Appeals found that the Commission had failed to adequately justify its retention of Section 22.903 in the *Broadband PCS* docket, in light of the Commission's decision permitting LECs (including BOCs) to provide PCS under nonstructural safeguards.[34] The court stated that the Commission was required to give a reasoned explanation of its disparate treatment of the Bell companies.[35] The court directed the Commission to reexamine whether the Section 22.903 "still in any way serves the public interest." Accordingly, the court remanded the matter to the Commission with instructions to promptly conduct an inquiry into whether the structural separation requirement continues to serve as "a necessary regulatory restriction on BellSouth and other Bell Operating Companies."[36]

18. BOC Requests for Relief from Section 22.903. Both before and after the *Cincinnati Bell* decision, a number of BOCs filed waiver petitions seeking varying forms of relief from the requirements of Section 22.903. As summarized below, the Commission has granted one such waiver (Southwestern), another has been withdrawn (BellSouth), and the remainder (U S West, Bell Atlantic) are pending.

19. On October 23, 1995, we granted Southwestern Bell Mobile Systems (SBMS) a limited waiver of Section 22.903 to enable it to provide integrated cellular and "Competitive Landline Local Exchange" (CLLE) service outside of Southwestern Bell Telephone

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[31] *Id.* at 1492. Pacific and Ameritech sought reconsideration of these determinations. *See* Petition for Clarification or Reconsideration of Pacific Bell, filed in GEN Docket No. 93-252 at 2-5 (May 19, 1994); Ameritech Petition for Reconsideration filed in GEN Docket No. 93-252 at 1 (May 19, 1994).

[32] *See* Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, GEN Docket No. 94-90, Report and Order, 10 FCC Rcd 6280 (1995) (*Wireline SMR Order*), *reconsideration pending.*

[33] *Id.* at 6293.

[34] *Cincinnati Bell,* 69 F. 3d at 765-68. The *Cincinnati Bell* decision also remanded the Commission's cellular attribution and cellular/PCS cross-ownership requirements. These rules are being examined in a separate proceeding.

[35] *Id.* at 768.

[36] *Id.*

Company's (SWBT) local exchange service area.[37] SBMS had sought permission to provide these services on an integrated basis without being required to create a new structurally separate entity.[38] We concluded that the waiver would promote significant Commission objectives by encouraging local loop competition, avoiding duplicative costs, and promoting increased efficiency, thus enhancing SBMS' ability to provide innovative service. We also found that rigid application of Section 22.903 to out-of-region cellular and landline services would not serve the public interest objectives of the rule, and would impose a significant and unnecessary regulatory burden on a potentially valuable service.

20. On November 8, 1995, U S West, Inc. (U S West) filed a request for waiver of Section 22.903 so that its out-of-region telecommunications subsidiaries and affiliates can provide integrated cellular and CLLE services through a single company. Similarly, on January 19, 1996, Bell Atlantic NYNEX Mobile, Inc. (BANM) also sought a waiver of Section 22.903 to the extent necessary to permit BANM to provide integrated competitive landline local exchange services outside the combined Bell Atlantic and NYNEX local exchange service regions. U S West and BANM each argue that its waiver request is identical to the SBMS request, and should be granted under the same rationale.

21. On August 25, 1995, BellSouth Corporation (BellSouth), filed a request seeking authorization to engage in in-region resale of cellular service without the structural separations required by Section 22.903.[39] BellSouth stated that it sought to provide integrated landline local exchange, cellular, and PCS through its incumbent LEC, BellSouth Telecommunications, Inc. (BST), by reselling the cellular and PCS service of its own affiliates, as well as that of unaffiliated providers.[40] BellSouth argued that the structural separation rule no longer serves the public interest, and prevents it from offering customers "one-stop shopping" for integrated wireline and wireless services, while potential competitors such as GTE, AT&T, and Sprint are not subject to the structural separation requirement for landline, cellular and PCS service

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[37] *SBMS Waiver Order* at para. 24.

[38] SBMS emphasized that all of its cellular operations will continue to be structurally separated from those of SWBT, as required by Section 22.903, and that it will provide CLLE service only in markets where the existing LEC is a carrier other than SWBT.

[39] Prior to this request, BellSouth had sought clarification that resale by a BOC does not constitute the "provision" of cellular service for purposes of Section 22.903. The Wireless Telecommunications Bureau found that a reseller of cellular service is engaged in the "provision of cellular service" for purposes of Section 22.903 and thus denied BellSouth's Request. *See* BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Cellular Corp., Petition for Declaratory Ruling, *Order*, DA 95-1401, (Wir. Tele. Bur. June 22, 1995).

[40] Specifically, BellSouth Corporation (BellSouth) sought authorization for its local exchange subsidiary, BST, and its "structurally unseparated" PCS subsidiary, BellSouth Personal Communications, Inc. (BPCI), to resell cellular service on an integrated basis together with landline local exchange service and PCS. *See* BellSouth Reply at 1-2.

offerings.[41] On February 12, 1996, BellSouth formally withdrew its Resale Authorization Request.[42]

22. On October 11, 1995, Ameritech Communications, Inc. (ACI), a newly-formed, structurally separate subsidiary of Ameritech Corporation, requested a limited waiver of Section 22.903 in order to provide integrated in-region local exchange, long distance, and cellular service. ACI was formed prior to the 1996 Act, in part, to enable Ameritech to obtain relief from the MFJ in exchange for opening its local exchange bottleneck to competition. Because ACI is and will remain an entity structurally separated from Ameritech, ACI requests a waiver only of the provisions of Section 22.903 that (1) prohibit a BOC-affiliated cellular carrier from owning landline facilities, and (2) prohibit a BOC affiliate from engaging in the sale and promotion of cellular service.

23. The Telecommunications Act of 1996. The 1996 Act contains specific requirements that BOCs be permitted to enter into previously prohibited or constrained lines of business, including, *inter alia*, in-region interLATA telecommunications services, interLATA manufacturing, information, and electronic publishing services through a separate affiliate.[43] In certain cases, this separate subsidiary requirement "sunsets" after a number of years.[44] With respect to in-region interLATA service, these separate affiliates are under additional structural and transactional constraints similar to, although more stringent than, those contained in Section 22.903(b)-(g), including the requirement that the BOC deal with the separate affiliate on an "arm's length basis."[45] Section 272(c) imposes additional nondiscrimination safeguards on a BOC's dealings with its separate affiliate.[46] With the

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[41] *See, e.g.,* BellSouth Request at 2-15, 18-20.

[42] *See Ex Parte* Letter from Jim O. Llewellyn, BellSouth, dated February 12, 1996, to William F.Caton, Acting Secretary, FCC, Re: BellSouth Corporation, Request for Resale Authorization - DA 95-1901. Notwithstanding the withdrawal of BellSouth's Request, we take administrative notice of the record developed in response thereto prior to the withdrawal, and discuss the issues raised as they relate to the matters under discussion in this rulemaking.

[43] *See* Sections 271 (BOC InterLATA Entry); 272 (BOC Separate Affiliate; Safeguards, includes origination of In-region InterLATA services, Manufacturing, and InterLATA Information services); 273 (Manufacturing by BOCs); and 274 (Electronic Publishing by BOCs). 47 U.S.C. §§ 271-73. The Commission generally is instructed to develop appropriate regulations to ensure against cross-subsidies where the LEC entity is providing assets or services to, or purchasing assets or services from, its nonregulated affiliate. *See* Section 272(c)(2) and 274 (b)(3) and (4), 47 U.S.C. §§ 272(c)(2) and 274(b)(3)-(4).

[44] *See, e.g.,* Section 272(f) and Section 274(g), 47 U.S.C. §§ 272(f) and 274(g).

[45] *See* Section 272(b)(5), 47 U.S.C. § 272(b)(5).

[46] These safeguards: (1) prohibit a BOC from discriminating between the affiliate and any other entity in the provision of goods, services, facilities and information or in the establishment of standards, and (2) require the BOC to account for all transactions with the affiliate in accordance with generally accepted accounting principles. 47 U.S.C. § 272(c). Under Section 272(e), a BOC, and any affiliate that is subject to the Section

addition of new Section 601(d), the 1996 Act expressly permits BOCs to market jointly and sell CMRS together with a variety of landline services.[47] Section 702 of the 1996 Act amended Title II of the 1934 Act to add new Section 222, which contains new requirements for maintaining the confidentiality of carrier information and CPNI.[48]

IV. BOC CELLULAR SAFEGUARDS

A. Introduction

24. In this section we address one of the issues remanded by the Sixth Circuit in *Cincinnati Bell*, "whether the structural separation requirement continues to serve as a necessary regulatory restriction" on the BOCs.[49] We discuss this question below, and propose a series of amendments to the rule intended to provide BOCs sufficient flexibility in serving the public, while preserving our ability, and the ability of BOC competitors, to detect and correct any potential anticompetitive behavior, whether that be cost shifting, interconnection discrimination, or some other form of leveraging the BOCs' dominant position in the local exchange market. We also seek comment whether the public interest would be better served by (1) a transitional arrangement whereby some aspects of our current structural separation requirements would be retained during an interim period or (2) immediate replacement of Section 22.903 with the uniform streamlined safeguards we propose in Sections V and VI for in-region LEC PCS and other commercial mobile radio services.

B. Record on Continued Need for Section 22.903

25. In response to the various BOC waiver petitions, and in *ex parte* filings responding to the Sixth Circuit's *Cincinnati Bell* remand decision, described above in Section II, a record was developed on the question of the continued need for Section 22.903. Insofar as the issues raised in those pleadings directly address the question of structural versus nonstructural safeguards and implementation of the provisions of the 1996 Act regarding

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251(c) incumbent LEC interconnection obligations must: (1) fulfill requests from unaffiliated entities for exchange service and exchange access within a period no longer than it provides such service to itself or its affiliates; (2) not provide any facilities, services, or information concerning its provision of exchange access to the separate affiliates unless such facilities, services, etc. are available to other interLATA service providers in the market on the same terms and conditions; (3) charge the separate affiliate or impute to itself the same rates for access to its local exchange service and exchange access charged to unaffiliated interexchange carriers; and (4) may provide interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are available to all carriers at the same rates, terms and conditions and so long as the costs are appropriately allocated. 47 U.S.C. § 272(e). The subsection (e) requirements do not sunset pursuant to Section 272(f)(1) and (2), 47 U.S.C. § 272(f)(1)-(2).

[47] *See* 47 U.S.C. § 521(d).

[48] *See* 47 U.S.C. § 222.

[49] *Cincinnati Bell*, 69 F. 3d at 768.

BOC provision of CMRS, they are summarized fully in Appendix A.[50] In this section, we highlight the general policy arguments supporting and opposing retention of Section 22.903.

26. In general, the BOCs argue that Section 22.903 is no longer needed to prevent cross-subsidization of cellular operations or to assure nondiscriminatory interconnection, and should be eliminated in its entirety.[51] BellSouth argues, in its Resale Request, that structural separation was intended to foster the competitive development of the new cellular industry, and that the rule was never intended to be either absolute or permanent. BellSouth argues that market circumstances have changed dramatically since the structural safeguards were adopted, and that the rule is no longer needed to deter cross-subsidization and discriminatory interconnection. Continued application of this requirement to the BOCs alone, according to BellSouth, places BOCs at a competitive disadvantage with respect to wireless providers, particularly PCS providers who may offer integrated landline and wireless services.[52] Bell Atlantic claims that "one-stop-shopping" is an important customer requirement, and that recent studies conclude that the vast majority of customers want a single provider for all their telecommunications needs. Bell Atlantic argues that its competitors have already begun to offer packaged services, or have announced their intention to do so in the near future.[53]

27. Southwestern Bell and Bell Atlantic also argue that the public interest would be served by the elimination of the structural separation requirements of Section 22.903 in light of the sufficiency of existing nonstructural safeguards to address any possible concerns regarding cross-subsidization or interconnection discrimination.[54] Southwestern Bell contends that the existing separation rule -- which applies only to the BOCs and only to their cellular service, harms consumers and inhibits competition.[55] Several BOCs have taken the position,

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[50] In particular, the record in response to the BellSouth Resale Request presents the opposing parties' views on the alleged competitive dangers posed by a BOC's direct provision of in-region, integrated landline and cellular service (on a resale basis).

[51] *See, e.g., Ex Parte* Letter from Patricia E. Koch, Bell Atlantic to Mr. William F. Caton, Acting Secretary, FCC, dated December 7, 1995, GEN Docket No. 90-314 -- Personal Communications Service (PCS), Attachment (Bell Atlantic 12/7/95 Ex Parte).

[52] BellSouth Request at 2-6.

[53] Bell Atlantic 12/7/95 *Ex Parte.*

[54] *Ex Parte* Letter from Richard M. Firestone, on behalf of SBC Communications, Inc. and Southwestern Bell Mobile Systems, dated December 15, 1995 to Ms. Rosalind Allen, Wireless Telecommunications Bureau, FCC, Attached *Ex Parte* Presentation at 1-2 (SBC 12/15/95 Letter); Bell Atlantic 12/7/95 *Ex Parte*, Attachment.

[55] SBC 12/15/95 Letter.

in response to the Sixth Circuit's *Cincinnati Bell* decision, that the court has directed the Commission to immediately eliminate Section 22.903.[56]

28. Opponents of the relief requested by the BOCs generally caution that circumstances have not changed with respect to the BOCs' dominant market position. AT&T argues that while competition has taken hold in many telecommunications services, the BOCs continue to dominate the local exchange market, and can use their control of bottleneck facilities to disadvantage wireless competitors with respect to interconnection.[57] Others argue that the presence of companies such as AT&T and AirTouch in the wireless market does not diminish the need for structural separations. Despite the fact that some of these companies have a nationwide presence in wireless, these commenters contend, they still are new entrants into the local exchange market.[58] Nextel dismisses BellSouth arguments that AT&T, MCI, Sprint, and GTE are competitive threats to BellSouth's ability to provide its customers with "one-stop shopping" because these carriers are not yet providing landline local exchange service within BellSouth's territory.

29. In a set of joint *ex parte* letters concerning the *Cincinnati Bell Order*, AirTouch, Comcast, and Cox argue that the BOCs' requests for relief from structural separations ignore the effects of their continuing and undisputed control over essential bottleneck facilities. They state that the LECs' wireless competitors will need to enter into a series of agreements with the incumbents for such things as mutual exchange of traffic, the location of equipment and the sharing of network functionalities. They argue that LEC ability to control the fate of their competitors makes LECs with CMRS affiliates a special case, and that, as part of the remand proceeding, the Commission must examine the competitive issues raised by in-region cellular and broadband PCS activity by the LECs.[59]

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[56] *See, e.g.,* Bell Atlantic 12/7/95 *Ex Parte*, Attachment; SBC 12/15/95 Letter, Attached *ex parte Presentation* at 1-2; *ex parte Letter* from Ben Almond, BellSouth Corporation dated November 20, 1995 to Mr. William F. Caton, FCC, Re: BellSouth's Request for Resell Authorization, DA 95-1901 and DA 95-1968 (Attaching *Ex Parte* Letters from David Markey of BellSouth to each of the Commissioners, dated November 20, 1995); *Ex Parte* Letter from Charles P. Featherstun, BellSouth Corporation, dated November 29, 1995, Re: FCC action on remand from *BellSouth Corporation v. FCC*, Case Nos. 94-4113, 95-3315, consolidated with *Cincinnati Bell Telephone Co. v. FCC*, Nos. 94-3701/4113, 95-3023/3238/3315 (6th Cir. Nov. 9, 1995).

[57] *See, e,g,,* AT&T Comments at 3-14.

[58] AirLink observes that "[w]hile AT&T may be seeking to use wireless services as a strategy to enter the local exchange market this is merely an *entry* strategy." AirLink Comments at 2-5. *See also* AT&T Comments at 2-6.

[59] *Ex Parte* Letter from Warner K. Hartenberger, Dow, Lohnes and Albertson, on behalf of AirTouch Communications, Inc., Comcast Corporation, and Cox Enterprises, to William E. Kennard, General Counsel, FCC, FCC, dated January 18, 1996 (Airtouch, *et al.,* General Counsel Letter) and attached *Ex Parte* Letter from Brian Kidney, AirTouch Communications, Inc., Joseph S. Wax, Jr., Comcast Corporation, and Alexander V. Netchvolodoff, Cox Enterprises, to the Honorable Reed Hundt, Chairman (Airtouch, *et al.,* Chairman Letter) (jointly, Joint Safeguards *Ex Parte*).

30. In particular, AirTouch, Comcast, and Cox argue that rather than accepting at face value LEC claims of "cost savings" and "efficiencies" of "integrated" LEC wireless activity, the Commission must require LECs to quantify the harm they allege is inherent in retaining or expanding structural separation. They further contend that the success of BOC cellular affiliates demonstrates that structurally separate BOC in-region cellular operators have a firmly established brand name, vibrantly growing customer base and are financially solid. According to AirTouch, Comcast, and Cox, competitors of the LECs will be harmed if structural separation or equally effective nonstructural safeguards are not imposed on LEC in-region wireless activity. They claim that structural separation is one way to address the acknowledged incentive and ability of a LEC to favor its own CMRS operations.[60] In addition, they argue that BOCs, to gain relief from the cellular structural separation requirement, must show that the elimination of the requirement is not harmful despite the persistence of the local exchange bottleneck.[61] Several BOCs filed responses opposing the relief requested in the Joint Safeguards *Ex Parte* letter, with Southwestern advocating immediate elimination of Section 22.903.[62]

C. Interconnection Actions Relevant to Structural Separation

31. As noted above, one of the primary objectives underlying our adoption of structural separations was to prevent interconnection discrimination by BOCs in their relationship with affiliated and unaffiliated cellular carriers. In considering whether to retain structural separation for BOC cellular service, we must take into account whether proposed changes to our existing LEC CMRS interconnection policies either support retention of Section 22.903, or demonstrate its obsolescence. In addition, the 1996 Act contains significant new provisions with respect to interconnection. We briefly review the nature of these pending changes in this section.

32. Current FCC Requirements. The LECs' cellular interconnection obligations were defined in the same order that established the structural separations requirements, as part of a comprehensive regulatory framework. In the *Cellular Order*, the Commission required the BOCs to furnish interconnection to cellular systems upon terms "no less favorable than those offered to the cellular systems of affiliated entities or independent telephone companies."[63] In its subsequent *Policy Statement*, the Commission outlined its interconnection

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[60] The Airtouch, *et al.* General Counsel Letter, at 6 and 7, also requests that the Commission defer any action on the PacTel Safeguards Plan pending a general rulemaking inquiry into necessary LEC wireless safeguards, as a result of the remand of the *Cincinnati Bell* case.

[61] Joint Safeguards *Ex Parte* at 4-5.

[62] *See Ex Parte* Letter from Daniel L. Poole, U S West, to William E. Kennard, General Counsel, FCC, dated February 5, 1996; *Ex Parte* Letter from Gina Harrison, Pacific Telesis, to William F. Caton, Acting Secretary, FCC, dated February 9, 1996; *Ex Parte* Letter from Michael W. Bennett, SBC Communications Inc. to Mr. William F. Caton, Acting Secretary, FCC, dated February 14, 1996.

[63] *Cellular Order*, 86 FCC 2d at 496.

standard, which requires all local telephone companies to provide: (1) the type of interconnection the mobile carrier requests; (2) interconnection to the nonwireline carrier that is not less favorable than that furnished to its affiliated wireline cellular carrier; and (3) reasonable interconnection arrangements with the nonwireline carrier that may not be the same as those used by the wireline cellular carrier.[64]

33. This framework for LEC provision of interconnection to cellular licensees was further refined in the *Interconnection Order*,[65] in which the Commission ordered the LECs to engage in good faith negotiation over the terms and conditions of interconnection with cellular carriers.[66] The Commission stated that it expected the agreements to be concluded without delay, noting that a cellular carrier having difficulty obtaining a good faith agreement may file a complaint before the Commission under Section 208 or 312 of the Act. The Commission further determined that the relationship between the landline carrier and the cellular carrier was that of "co-carriers," and therefore the Commission expected the carriers to observe the principal of mutual compensation.[67] In the *CMRS Second Report and Order*, we extended our existing policies with respect to LEC/cellular interconnection to cover LEC interconnection with all CMRS providers.[68]

34. Pending FCC Rule Changes. We have continued to examine LEC/CMRS interconnection issues in recent dockets. On December 15, 1995, we initiated CC Docket No. 95-185 by adopting an NPRM to examine issues relating to compensation for LEC/CMRS interconnection.[69] In the *Interconnection Compensation NPRM*, we found that if the commercial mobile radio services are to compete directly against LEC landline services, it is important that the prices, terms and conditions of interconnection arrangements not serve to buttress LEC market power against erosion by competition. The *Interconnection Compensation NPRM* further finds that, at least for the near future, there is likely to be an

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[64] *See* The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 Rad.Reg.2d (P & F) 1275, 1283-84 (1986) (*Policy Statement*); *citing Cellular Reconsideration Order*, 89 FCC 2d at 81-82; *Cellular Order*, 86 FCC 2d at 495-96. *See also* The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 4 FCC Rcd 2369, 2377 n.16 (1989) (*Interconnection Reconsideration Order*), *aff'g Interconnection Order*, 2 FCC Rcd 2910 (1987) (Commission adopted policy statement rather than specific rules because of existence of a variety of interconnection arrangements and system designs). *Cf. CMRS Second Report*, 9 FCC Rcd at 1498.

[65] *Interconnection Order*, 2 FCC Rcd at 2913.

[66] *Id.* at 2912-2913, 2916.

[67] *Id.* at 2916.

[68] *CMRS Second Report and Order*, 9 FCC Rcd at 1497-1499; *see also* 47 U.S.C. §§ 201, 332(c)(1)(B).

[69] Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, CC Docket No. 94-54, FCC 95-505 (released Jan, 11, 1996) (*Interconnection Compensation NPRM*).

imbalance in negotiating power between the incumbent LECs and new CMRS providers seeking to enter local markets. Thus, we have recently found that our existing LEC/CMRS interconnection rules and policies are insufficient to protect against discriminatory interconnection practices and rates, and have tentatively concluded that further regulatory oversight and intervention will be needed for some time in the future in order to prevent the LECs from abusing their position of control over interconnection to the public switched telephone network.[70]

35. Interconnection Changes Pursuant to Sections 251 and 252. Section 251 of the 1996 Act imposes extensive interconnection obligations on all telecommunications carriers, and particularly on LECs and incumbent LECs. Section 251(a) imposes a general duty on all telecommunications carriers (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to Section 255 or 256. The new interconnection obligations in Section 251(b) for LECs govern LEC provision of: resale; number portability; dialing parity; access to rights-of-way; and reciprocal compensation for the transport and termination of traffic originating on another carrier's facilities.[71]

36. Section 251(c) contains additional obligations for incumbent LECs, which include, *inter alia*: (1) good faith negotiation of terms and conditions of agreements to fulfill Section 251(b) and (c) interconnection obligations; (2) provision of interconnection with the LEC's network for transmission and routing of telephone exchange and exchange access service, at any technically feasible point, that is at least equal in quality to that provide by the LEC to itself or any affiliate or other party, on rates, terms and conditions that are just, reasonable and nondiscriminatory; (3) provision of unbundled, nondiscriminatory access to network elements to any requesting telecommunications carrier, at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory; (4) provision of public notice of changes in the information necessary for transmission and routing of services

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[70] In an Order and Supplemental Notice of Proposed Rulemaking released on February 16, 1996, we found that the 1996 Act may have an impact on the *LEC/CMRS Interconnection Compensation* proceeding in CC Docket 95-185, and requested parties to include in their responses to the Notice, commentary on the implications of the 1996 Act on our proposals and topics regarding interconnection between LECs and CMRS providers. Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, Order and Supplemental Notice of Proposed Rulemaking, CC Docket No. 94-54, FCC 96-61, released Feb. 16, 1996.

[71] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (rel. Apr. 19, 1996) (*Local Competition Notice*). The *Local Competition Notice* sought comment on how best to establish a competitive, yet deregulatory, national framework for network interconnection pursuant to Sections 251 and 252 of the 1996 Act. 47 U.S.C. §§ 251, 252. The Commission adopted a report and order in this proceeding on August 1, 1996. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, News Report No. DC 96-75 (released Aug. 1, 1996).

using the LEC's network or of changes that would affect interoperabililty; and (5) the duty to provide physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the LEC, on reasonable and nondiscriminatory rates, terms and conditions, unless the LEC demonstrates to the State commission that physical collocation is not practical due to technical reasons or space limitations, in which case the LEC may provide virtual collocation. Section 252 contains procedures for negotiation, arbitration, and approval of agreements, and gives the States authority to resolve interconnection disputes arising under Sections 251 and 252. In addition, pursuant to new Section 252(i), a LEC must make available to any requesting carrier, on the same terms and conditions, any interconnection, service, or network element provided under an approved agreement to which it is a party.[72]

D. Analysis of Continued Need for Section 22.903

1. Background

37. The question remanded by the Sixth Circuit is whether the structural separation requirements of Section 22.903 continue to serve as a "necessary regulatory restriction" on the Bell operating companies,[73] or, whether changed circumstances, regulatory or otherwise, have either obviated the need for such restrictions, or rendered them contrary to the public interest. This Commission has repeatedly grappled with the question of traditional structural versus nonstructural safeguards in the contexts of LEC landline enhanced, CPE, and wireless services. Although the results have varied over time, our fundamental approach and analysis of the question has remained consistent. The restrictions on the Bell companies in Section 22.903 were imposed, as a general matter, in recognition of their dominant market position in the local and exchange access markets, to prevent them from leveraging their dominance into the newly created cellular service markets. The structural separation requirements were specifically intended to protect BOC local exchange ratepayers by preventing cross-subsidization of the more competitive cellular service, and to prevent discriminatory interconnection practices with respect to the non-wireline cellular provider by requiring that the wireline and non-wireline entities exist independently from one another with respect to facilities, operations, management and other personnel. With respect to both cross-subsidization and interconnection, structural separation was believed to permit easier detection and disclosure of improper activities, and to reduce unnecessary regulatory intrusion into competitive or unregulated operations.

38. We have also recognized that structural separation entails costs to the carriers, in the form of lost efficiencies of scope and added costs of establishing separate facilities, operations, and personnel, as well as lost opportunities for customers to obtain integrated and

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[72] *See* 47 U.S.C. §§ 252, 252.

[73] *See Cincinnati Bell*, 69 F.3d at 767-68.

innovative service packages.[74] In the case of CPE and enhanced services, the Commission recognized costs to small business and residential customers because the BOCs, which already had existing marketing contacts with households in their service regions, could not inform them of new and desirable enhanced service offerings, such as voice messaging, through existing marketing contacts. The result, in many cases, was that such customers would never learn of the availability of such desired offerings at all. Thus, in the *Computer III* proceedings, the public benefit of dissemination of advanced telephone offerings that has been the product of joint marketing of basic and enhanced services and CPE was found to outweigh the costs to competition of integrated BOC offerings, if such integrated services were provided pursuant to appropriate nonstructural safeguards.[75]

39. The BOCs claim that we have previously recognized the value of integrated offering with respect to enhanced services, CPE and PCS, and argue that the same rationale should apply to their provision of cellular service. Their competitors, on the other hand, have claimed that the benefits of service integration for the customers, and the cost savings to the BOCs, are vastly outweighed by the costs to competition that integrated operations would present. Although the *Broadband PCS* orders referred to the economies of scope arising from the use of "wireless loops" and "wireless tails,"[76] the Commission made no specific findings about the public benefits of integrated operations or joint marketing of BOC cellular and landline services. Nor did it undertake the task of reviewing the nonstructural safeguards developed for the BOCs' provision of integrated local exchange and enhanced services and CPE to determine their suitability for application to the LEC provision of CMRS. In contrast to the *Computer III* proceeding in which nondiscriminatory network interconnection safeguards were a prominent feature of the nonstructural safeguard plan,[77] the only nonstructural safeguards specifically addressed in the *Broadband PCS* proceeding were the cost accounting and allocation rules contained in Parts 32 and 64 of the Commission's rules. Thus, the nature of the nonstructural safeguards, other than the accounting rules, that might be applied in lieu of structural separations to LEC-provided CMRS has never been squarely addressed by this Commission, and we begin the process of doing so in this Notice, as part of our examination of the issues remanded by the Sixth Circuit in the *Cincinnati Bell* decision.

2. Discussion

40. We observe that, in light of the many separate affiliate requirements in the 1996 Act, it is evident that Congress has concluded as a general matter that such requirements, together with associated nondiscrimination safeguards, constitute an appropriate initial

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[74] *See, e.g., Cellular Reconsideration Order*, 89 FCC 2d at 77-80.

[75] *See, e.g., BOC Safeguards Order*, 6 FCC Rcd at 7622.

[76] *See, e.g., Broadband PCS Notice*, 7 FCC Rcd at 5707; *Broadband PCS Order*, 8 FCC Rcd at 7747-52.

[77] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer III*), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Computer III* Phase I Order) (subsequent history omitted).

safeguard for BOC entry into the provision of certain competitive services, which can be phased out as markets become more competitive. At the same time, we note that the BOCs have been subject to structural separation requirements for their cellular operations since their inception, and that the BOCs are generally incumbents in CMRS markets, facing market entry by PCS competitors. In this Notice, we explore varying approaches to separate affiliate and nondiscrimination safeguards for BOC cellular operations, while proposing to give full expression to Congressional intent regarding joint marketing, customer proprietary information and network information disclosure requirements.

41. At the outset, we think it important to define the terms that we utilize in this analysis. By "structural separation," we mean the kind of requirements that are spelled out in Section 22.903 and in our *Computer II* decisions. We define "separate affiliate" requirements more generally, so as to include structural separation, but also to encompass less restrictive provisions that relate to corporate structure without necessarily including requirements for separate officers, separate personnel, and arm's-length transactions. We thus propose, in later sections of this Notice, limited, "non-structural" separate affiliate requirements which do not entail all aspects of structural separation.

42. We find that although there have been vast changes in the nature of the wireless market since the 1981 imposition of our BOC cellular structural separation requirement, the market power of the BOCs in the landline local exchange and exchange access markets has remained relatively stable, and is likely to remain so until the sweeping market entry and interconnection changes authorized by the 1996 Act have taken hold. We note that the interconnection provisions of the 1996 Act, designed to facilitate entry into the local exchange market, have only recently been legislated and will not be implemented for at least several months. The BOCs thus currently retain market power in the local exchange market, and therefore control over public switched network interconnection, within their in-region states. We seek comment as to whether in-region application of separate affiliate and nondiscrimination requirements would continue to serve as an important regulatory check on the BOCs' market power in local exchange.[78] In the following paragraphs, we examine each of the traditional bases for our cellular structural separation requirement in light of today's telecommunications market and regulatory framework, and also examine the overall relative merits of structural versus non-structural safeguards.

43. Interconnection. Prevention of interconnection discrimination was, as we have discussed above, one of the central justifications for imposing structural separation. The insufficiency of our existing interconnection safeguards to protect against CMRS interconnection pricing discrimination has been extensively discussed in the *LEC/CMRS Interconnection Compensation NPRM*. We also note that these existing LEC/CMRS interconnection requirements grew from the initial requirement that LECs (at that time, primarily the AT&T Bell operating companies) offer the nonwireline cellular carrier

[78] We discuss the separate, but related, questions of regulatory symmetry among LEC providers of cellular service in greater detail in Section V and LEC PCS/cellular symmetry in Section VI, below.

interconnection arrangements no less favorable than those offered to their wireline affiliates, and this obligation was established in the same order creating the cellular structural separation requirement.[79] A separate cellular affiliate provides a template by which to measure the rates, terms and conditions of these entities' interconnection agreements with their affiliated LECs. The effective enforcement of nondiscrimination rules depends on the visibility of the transactions under scrutiny. Such visibility does not depend on structural separation *per se*, however, but could be achieved through a more limited separate affiliate requirement, including one that permitted integrated management with affiliates providing landline services. We believe that it will be particularly crucial to retain some form of separate affiliate requirement, either structural or non-structural, as the new CMRS entrants begin to negotiate their interconnection arrangements with the incumbent BOCs.[80] We seek comment on our analysis.

44. Price Discrimination. Another aspect of the problem alleged by BOC CMRS competitors is that integrated operations present opportunities for pricing discrimination.[81] Competitors have essentially complained that, absent separation of these activities into two corporate structures, any "charge" that a local exchange carrier places on services or facilities provided to wireless operations would be merely a bookkeeping entry, subject to the cost allocation requirements of Section 64.901 of our rules.[82] In order to determine whether such carriers were pursuing a nondiscriminatory pricing policy, competitors and this Commission would be required to compare these cost allocations with actual charges levied on non-affiliated competitors, which they maintain would be a problematic comparison, especially where allocations of joint and common costs are concerned. We are concerned that the possibility of discrimination by a BOC or incumbent LEC in favor of its own cellular operations and against other CMRS providers could be increased absent some form of separate subsidiary requirement, either structural or non-structural, and that our tasks of detecting such discrimination and determining whether it is reasonable or unreasonable would be greatly complicated. We seek comment on the value of separate affiliates in detecting and deterring pricing discrimination, and whether the degree of separation (*i.e.*, structural versus non-structural) has any effect on the value of this safeguard.

45. Cross-subsidization. With respect to the other historical basis for the structural separation requirement, the BOCs have argued that the possibilities of cross-subsidization have greatly declined in number and scope since the early 1980s, so that cross-subsidization no longer serves as a rationale for keeping the structural separation requirement of Section 22.903. They claim that they have neither the incentive nor the opportunity to cross-subsidize

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[79] *Cellular Order*, 86 FCC 2d at 493-95.

[80] For similar reasons, we propose to require all Tier 1 LECs to provide their cellular, PCS and, potentially, SMR services through non-structurally separated affiliates, as discussed in Section VI, below.

[81] *See BOC Separation Order*, 95 FCC 2d at 1129.

[82] Section 64.901, 47 C.F.R. § 64.901.

cellular service. In contrast, their competitors have argued that none of the changes in accounting rules, reporting requirements, audit schedules or the adoption of the price cap form of rate regulation, cited by the BOCs, can replace the protections against cross-subsidy offered by Section 22.903. In addition, they maintain that cross-subsidization through misallocation or misassignment of costs is still possible, and that the detection of landline to cellular cross-subsidization is made more difficult by the fact that cellular rates are no longer subject to tariff.[83]

46. In the *Computer II* and *BOC Separation Orders*, the Commission observed that structural separation and cost accounting rules are two complementary parts of a single regulatory regime.[84] Our subsequent *Joint Cost Order*, and the rules and regulations adopted thereunder, impose significant additional new cost allocation and affiliate transaction rules on the LECs, that were specifically designed to prevent cost-shifting in an environment of LEC provision of integrated regulated and unregulated services.[85] Our *Joint Cost Order*, affiliate transaction and Part 64 cost allocation rules, together with our price cap regime for tariffed LEC interstate services go far in reducing the possibility of undetected cost-shifting among the LEC interstate services. Nonetheless, some commenters continue to argue that cross-subsidization is possible even under a price cap regime, for those services that are either not subject to a "pure price cap" option, or continue to be regulated under a rate-of-return system at the intrastate level. Presumably, the cost-shifting these parties are concerned with would occur between the as-yet primarily intrastate competitive cellular service and the intrastate as-yet primarily monopoly local exchange service.[86] We seek further comment on these issues, and urge the parties alleging continued cross-subsidy problems under price caps to provide specific data and argumentation in support of their claims and to address the relative value of structural and non-structural separate affiliate requirements in this regard.

47. Leveraging of Market Power. One concern with respect to integrated landline and cellular operations has been the incentives and opportunities such a corporate structure

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[83] *See* Comments on Cross-Subsidy Issues in Appendix A and Comments on Cross-Subsidization in Appendix B.

[84] *BOC Separation Order*, 95 FCC 2d at 1129; *Computer II*, 77 FCC 2d at 463-64.

[85] Separation of Costs and Regulated Telephone Service from Costs of Nonregulated Activities & Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom. Southwestern Bell Corporation v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990). The *Joint Cost Order* adopted (1) cost allocation standards and, for LECs with annual operating revenues of $100 million or more, the requirement that a cost allocation manual (CAM) be filed with the Commission, with entries subject to public comment and Commission review; (2) rules for recording transactions between regulated telephone companies and their corporate affiliates; and (3) accounting procedures, audit requirements, and other implementation and enforcement mechanisms. *See* Parts 64 and 32.

[86] *See* comment summaries in Appendix A.